(a) to open up the bags in which the parcels were sent in the presence of the Customs;

(b) to record the particulars of parcels in the Record of Parcels, P3 (this was the register having the bottom part of the leaf in which entries of parcels received on June 20 was torn off) upon receipt of CD78 from the Customs;

(c) to keep the parcels in the warehouse, the key of which would be kept by the Postal Clerk;

(d) to release the parcels on production by the Customs the original copy of CD6 and the consignee the triplicate copy of CD6 and to collect the amount of duty due as stated in CD6;

(e) to record the particulars of duty collected on P6 after delivery of the parcels and collection of duty.

Since I have concluded that there was a plot, there was no way for any other person to get involved to the exclusion of the Parcel Clerk as he would be doing the recording and having the custody of the parcels. PW1 testified further on this:

"I agree that parcel kept in the warehouse could not leave without the knowledge of the postal clerk."

The Postal Clerk opened the mail bags before the Customs Officer who was in collusion with him and the Customs Officer would omit to issue CD78.

Counsel for 3rd respondent argued that some one else other than 3rd respondent might have handed over the offending parcels to the 1st respondent. He quoted the evidence of PW3 that a different postal clerk removed these parcels with the assistance of a postman to the despatch section. He said this postman was not called and he asked who handed the parcels? It would appear the evidence of PW3 on this point was not in reference to the transaction on that particular day, June 22. But he testified that 3rd respondent was at his counter. If 3rd respondent chose to rely on the evidence of PW3 on this point, he should also rely on the other part from PW3's evidence in which PW3 stated that 3rd respondent asked him to tamper with CD6. There was this other evidence to say that it was 3rd respondent who handed the 11 parcels to 1st respondent. The counsel for the 3rd respondent in cross-examination in the court below put the question to PW3 as follows:

"Put: On that morning June 22, 1974 accused 3 complained bitterly about the non-inclusion of parcel No. 9334-38 on Id 4A which was the only document he had. This complaint was made to you as you prepared CD6.

Ans: I disagree."

There were two other subsequent questions put to PW3 appearing on page 51 of the record of appeal which I need not quote here. Sufficient from these questions we could come to the conclusion that it was 3rd respondent who handed over the parcels to 1st respondent.

3rd respondent in handing over the parcels must have realised that there was something wrong. The triplicate copy of CD6 which must be produced by 1st respondent to him did not have the 5 offending parcels written on it. He must therefore suspect that there was something wrong. The alterations on the original of CD6 bore no initials and originally only in respect of 6 articles. The copy produced by 1st respondent was in respect of 6 articles only, why then did he deliver 5 other parcels to 1st respondent without further checking? This evidence alone would justify the calling of his defence. But as in the case of 2nd respondent, this evidence also affords corroboration to the evidence of PW3.

I also considered the discrepancies in the evidence of PW3 particularly on the point that he was asked to make the alteration on CD6. I think they were minor discrepancies which could be expected in the circumstances.

My order would, therefore, be: I allow the appeal. All the three respondents be called to enter into their defence on the charges preferred against them.

Appeal allowed.

Solicitors: *P. Dorairaj; Mohamed Yaacob & Gomez.*

PUBLIC PROSECUTOR v. GOH CHOOI GUAN

[R.Cr.J. (Syed Agil Barakbah J.) April 4, 1978]
[Alor Star — Kedah Criminal Revision No. 5 of 1978]

Criminal Law and Procedure — Revision — Jurisdiction — Part-heard case — Jurisdiction of President of Sessions Court transferred to post of Senior Federal Counsel, Customs & Excise Department — Whether he could resume hearing of part-heard case — Accused in custody for 2½ years — Criminal Procedure Code (F.M.S. Cap. 6), ss. 9 & 261 — Courts of Judicature Act 1964, s. 35 — Subordinate Courts Act (Act 92), ss. 59(2) & 76(2) — Firearms (Increased Penalties) Act, 1971, s. 8 — Arms Act, 1960, s. 9(a).

Criminal Law and Procedure — President, Sessions Court — Transfer as Senior Federal Counsel — Whether could resume hearing part-heard case — Criminal Procedure Code (F.M.S. Cap. 6), ss. 9 & 261.

Criminal Law and Procedure — "Ceases to exercise jurisdiction therein" — Interpretation of — Criminal Procedure Code (F.M.S. Cap. 6), s. 261.

The Senior Federal Counsel attached to the Royal Customs & Excise Department, Kuala Lumpur, applied to the court to exercise its revisionary jurisdiction under section 35 of the Courts of Judicature Act, 1964 to decide whether upon the transfer of the President, Sessions Court to the Royal Customs & Excise Department as Senior Federal Counsel, he had ceased to exercise any jurisdiction in the trial part-heard by him. The accused in that case was jointly charged with 6 others (who had been acquitted) for being in unlawful possession of a pistol under section 8 of the Firearms (Increased Penalties) Act, and for being in possession of 40 rounds of ammunition without a licence under section 9 of the Arms Act. He had, since May 18, 1976, been in custody.

Held: (1) in the case of a transfer to the post of Senior Federal Counsel or Deputy Public Prosecutor, the President or Magistrate did not cease to have jurisdiction, being still gazetted as such. He only ceased to officiate as a President or Magistrate;

(2) it was undesirable for a Deputy Public Prosecutor, whose duties were opposed to those of a President or a Magistrate and who had direct access to investigation papers of criminal cases, to sit on the Bench and continue the trial part-heard by him;

(3) the position of Senior Federal Counsel as in the present case was different from that of the Deputy Public Prosecutor. There should therefore be no likelihood of offending the principles if he were to continue the part-heard

case. Nevertheless, that power ought to be rarely exercised and only in exceptional cases.

Cases referred to:-

(1) *Public Prosecutor* v. *Kulasingam* [1974] 2 M.L.J. 26.

(2) *Oh Keng Seng* v. *Public Prosecutor* [1976] 1 M.L.J. 143.

(3) *Metropolitan Properties Co. Ltd.* v. *Lannon* [1969] 1 Q.B. 577 @ 599.

CRIMINAL REVISION.

Shaari Noor (Senior Federal Counsel) for the applicant.

Karpal Singh for the respondent.

Syed Agil Barakbah J.: This is an application by Encik Snaari Noor, the Senior Federal Counsel, attached to the Royal Customs & Excise Department, Kuala Lumpur, requesting me to exercise my supervisory and revisionary jurisdiction under section 35 of the Courts of Judicature Act, 1964 (Act 91). Prior to his transfer to the present post, he was the President of the Sessions Court, Sg. Patani, Kedah. In the course of his duties as such, he heard criminal cases Nos. 75/1975 and 76/1975 in which seven accused persons were jointly charged on two counts, viz. being in unlawful possession of a pistol under section 8 of the Firearms (Increased Penalties) Act, No. 37/71, and for being in possession of 40 rounds of .22 ammunition without a licence under section 9(a) of the Arms Act, No. 21/60. The case was heard on May 18, 1976. At the close of the prosecution case, he found that no *prima facie* case had been made out against six of the accused persons and he acquitted and discharged them accordingly. He called upon the defence of the 6th accused under both charges. The trial was adjourned to June 27, 1976, to enable the 6th accused to enter his defence. Hearing was further adjourned subsequently on a number of occasions for reasons recorded in the records of the case. Before the hearing could be continued by the same President, he was transferred to the present post as Senior Federal Counsel in the Customs & Excise Department, Kuala Lumpur. All along the accused has been in custody. On February 19, 1978, when Encik Shaari Noor sat on the Bench in the same court at Sg. Patani for the continuation of the hearing, the defence counsel, Mr. Karpal Singh, requested the trial be commenced *de novo* before another President on the ground that Encik Shaari is now a Deputy Public Prosecutor. In view of two conflicting decisions on the matter in *Public Prosecutor* v. *Kulasingam*[1] and in *Oh Keng Seng* v. *Public Prosecutor*,[2] the matter is now referred to me.

I have the advantage of reading the two decisions. The facts of the present case, I think, are more or less similar to the latter case. The sole question is whether upon the transfer of the President, Sessions Court, Sg. Patani to the Royal Customs & Excise Department, Kuala Lumpur as Senior Federal Counsel, he has ceased to exercise any jurisdiction in the trial part-heard by him.

The relevant provision is section 261 of the Criminal Procedure Code, which states:

"261. Whenever any Magistrate after having heard and recorded the whole or any part of the evidence in an inquiry or a trial ceases to exercise jurisdiction therein and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly recorded by himself, or he may re-summon the witnesses and recommence the inquiry or trial:

Provided as follows:

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;

(b) the High Court may, whether there be an appeal or not, set aside any conviction had or commitment made on evidence not wholly recorded by the Magistrate before whom the conviction was had or the commitment made, if such court is of opinion that the accused has been materially prejudiced thereby, and may order a new inquiry or trial."

The clause "ceases to exercise jurisdiction therein" requires a proper construction having regard to the surrounding circumstances. A Magistrate ceases to exercise jurisdiction in a criminal case by his untimely death, retirement or resignation. In all these cases, he will not be able to continue hearing any case part-heard by him. The succeeding Magistrate will therefore have to act according to the requirement of the section. However, in the case of a transfer to another State in the same or similar post, I do not think the section applies. Although section 9 of the Criminal Procedure Code and section 59(2) of the Subordinate Courts Act 92 provide local limits of jurisdiction of Sessions Courts, a President who is gazetted as such for the whole of West Malaysia, is empowered to continue the hearing of a case part-heard by him prior to his transfer. In the case of a Magistrate, the proviso of sub-section (2) of section 76 of the same Act accords him with jurisdiction to continue with such trial by virtue of his appointment duly gazetted in the former State. This is in accord with the principle that having seen and heard the witnesses they are the best persons to continue and complete the case in the interest of justice and with a view to ensuring a speedy trial.

In the case of a transfer to the post of Senior Federal Counsel or Deputy Public Prosecutor, I do not consider the President or Magistrate ceases to have jurisdiction, being still gazetted as such. He only ceases to officiate as a President or Magistrate. There appears to be no legal objection under any written law for him to continue the part-heard case. Nevertheless, a different question as regards public interest has to be considered in relation to the overriding principle that justice must not only be done but must manifestly and undoubtedly be seen to be done. A man is disqualified from sitting in a judicial capacity on ground of bias in favour of one side or the other, or of prejudice against one side or of contravention of the rules of natural justice. There need not be actual bias or prejudice, but it is sufficient if in the eyes of right-minded persons there is such likelihood, in the circumstances, even though he is impartial as can be. It is not the mind of the President or the Magistrate that has to be looked into and whether he favours one side at the expense of the other, but rather the impression which would be given to the public at large (per Lord Denning M.R. in *Metropolitan Properties Co. Ltd.* v. *Lannon*[3]). In the case of a Deputy Public Prosecutor, whose duties are opposed

to those of a President or a Magistrate and who has direct access to investigation papers of criminal cases, it is undesirable in the circumstances for him to sit on the Bench and continue the trial part-heard by him. The succeeding President or Magistrate will have to exercise his powers by invoking section 261.

The position of Senior Federal Counsel is, to my mind, slightly different, especially those who are attached to Federal Ministries and Departments. Their main duty is to give legal advice. Similarly, in the case of Encik Shaari. He is Legal Adviser to the Royal Customs & Excise and if there is any court work he has to perform occasionally, that will be confined to arguing criminal appeals in the High Courts in Customs and Excise cases. His position is unlike that of a Deputy Public Prosecutor in the States. There should therefore be no likelihood of offending the principles if he continues the part-heard case. Nevertheless, that ought to be rarely exercised and only in exceptional cases as the present case.

When I say the present case falls within the exceptional cases, I refer to the facts and surrounding circumstances and the probable effect caused by them. Firstly, the 6th accused was arrested on September 24, 1975 and was first produced in court on September 25, 1975. The first charge preferred against him under section 8 of the Firearms (Increased Penalties) Act, 1971, carries a maximum penalty of imprisonment which may extend to 14 years and with whipping with not less than six strokes. The second charge under section 9(a) of the Arms Act carries a penalty of imprisonment for a term not exceeding seven years or to a fine not exceeding $10,000 or to both such imprisonment and fine. The charges, especially the first, are serious. Secondly, the accused has been remanded in custody ever since arrest and though allowed bail at one stage on December 30, 1975, was again remanded in custody when the bailors were discharged on February 22, 1976 until now. He has been produced weekly in court on countless occasions until the case was part-heard by Encik Shaari and also thereafter. From the date of arrest until now the accused has been in custody for nearly two and a half years! I just cannot imagine any good reason for such a state of affairs to be allowed to happen without the case being heard and disposed of earlier.

Next comes the trial proper by Encik Shaari. He commenced hearing on February 21, 1976, heard two prosecution witnesses and continued hearing on May 16, 1976 when the prosecution closed their case after calling nine witnesses. In the course of the trial up to the prosecution stage Encik Shaari admitted a statement made by the 6th accused to the Police after holding a trial within a trial, made an order of acquittal and discharge on six of the accused persons and called upon the 6th accused to enter upon his defence on both charges. The circumstances are such that if the trial is ordered to be heard *de novo* or be commenced by the succeeding President from the stage heard by Encik Shaari, it will affect (i) the six accused persons who are already acquitted and discharged, (ii) the trial within a trial in which the statement by the 6th accused has been admitted because apparently the prosecution witnesses concerned will have to be recalled for their evidence to be recorded, and (iii) also the order for calling the defence of the 6th accused made by Encik Shaari, not to mention the very long lapse of time as stated above, in which case the witnesses might have forgotten most of the evidence. Moreover, Mr. Karpal Singh has applied for the six co-accused to be subpoenaed as defence witnesses, and made no objection at that time for Encik Shaari to continue with the hearing of the case, until the second occasion when Encik Shaari had come from Kuala Lumpur for the same purpose.

I therefore take the view for the reasons stated above, Encik Shaari should continue to hear the case which he has past-heard. I also make an order, which is necessary here, that there must not be any more adjournments and that Encik Shaari should complete hearing the case as soon as practicable from the date that he has fixed for continuation.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

TAN SIEW GAIK v. LOKE POH SEONG

[O.C.J. (Syed Agil Barakbah J.) April 8, 1978]
[Alor Star — Civil Suit No. 168 of 1966]

Contract — Agreement to sell land — Breach of — Land sold smaller than area agreed — Claim for specific performance or damages.

Evidence — Written agreement to sell a piece of land — Subsequent oral agreement between parties — Whether admissible — Evidence Act, 1950, s. 92.

The plaintiffs, administrators of the estate of the deceased, claimed for specific performance of a written agreement for the sale of land or damages for breach of contract against the defendant. The deceased had, under the written agreement, purchased 21,000 sq. ft. of land for $5,500 from the defendant. Subsequently, however, the deceased had discovered that of the 21,000 sq. ft. of land only 19,439 sq. ft. of land were transferred. The difference in portion of 1,561 sq. ft. of land had been sold as Lot No. 1438 to two other purchasers. The defendant contended that by a subsequent oral agreement the deceased had accepted the lesser portion in full satisfaction and discharge of the total purchase price of $5,500. The plaintiffs, on the other hand, claimed that the deceased agreed to accept the transfer on the condition that the portion in dispute was to be utilised as a public road for the housing project.

The issue before the court was whether the oral agreement between the deceased and the defendant made subsequent to the written agreement was admissible under section 92 of the Evidence Act.

Held, allowing the plaintiffs' claim: (1) the oral agreement did not contradict, vary, or subtract from, nor add to, the terms of the document of transfer within the meaning of section 92 of the Evidence Act. It was a stipulation which was unconnected with the document and was not an addition of the kind as envisaged by section 92;

(2) the plaintiff was entitled to damages for breach of contract since Lot 1438 had been sold by the defendant, to third parties.

Case referred to:-

(1) *Lebai Taib* v. *Abdul Gani & Anor.* [1973] 1 M.L.J. 109.

CIVIL SUIT.

Eugene Khoo for the plaintiffs.

Albert S.C. Hoe for the defendant.